No. 89-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR THE PETITIONER

Of Counsel:
THOMAS S. MARTIN
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036

RICHARD K. WILLARD
CHARLES G. COLE
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036

CAROL CONNOR FLOWE *
General Counsel

JEANNE K. BECK
Deputy General Counsel

JAMES J. ARMBRUSTER
PAULA J. CONNELLY
Attorneys

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006
(202) 778-8820

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-390

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR THE PETITIONER

---

1. In their opposition to PBGC's certiorari petition, the LTV respondents ignore the most important aspect of this case—the devastating impact of transferring to the already debt-laden pension insurance program more than $2 billion of LTV's unfunded pension liabilities. Moreover, the invitation of the court of appeals to other companies with seriously underfunded pension plans to follow LTV's example will convert the pension insurance program into an unintended bailout for financially troubled companies. *See* Petition 12-17.[1]

---

[1] The Equity Committee's assumption that the Plans would be restored on financial grounds on remand from the court of appeals' decision, *see* Equity Opp. 9, even if correct, ignores this aspect of the case. *See infra* at 5 n.5.

2. The Pension Protection Act does not diminish the importance of this case. Those amendments did not change section 4047, the principal statutory provision at issue, and even if they had been in effect, would not have changed the events or analysis in this case. The PPA amendments, moreover, do not alleviate the follow-on abuse problem even in cases in which they do apply. Indeed, in several cases currently before the PBGC that are governed by PPA, employers and unions—encouraged by the court of appeals—are attempting to couple follow-on plans with termination. The stringent requirements the PPA imposes will have no immediate effect on the huge underfunding that already exists in many large plans. Nor will they deter other employers from doing exactly what LTV did here—compel the PBGC to terminate their pension plans and then establish follow-on plans that continue the former pension arrangements at the expense of the federal insurance program. *See* Petition 16 n.14. Thus, even after PPA, follow-on plans still present a serious risk to the pension insurance program. When each case can add as much as half a billion dollars or more to PBGC's already substantial deficit, the nation runs the risk that by the time another case reaches the Court, the pension insurance program will be in the midst of an irreparable financial crisis.

3. The LTV respondents erroneously portray this case as nothing more than a factual dispute about the adequacy of the administrative record. In doing so, they simply ignore the important legal questions presented by the PBGC and the Solicitor General.[2] Thus, the LTV

[2] Rather than defend the legal analysis of the courts below, the respondents argue that PBGC failed to provide an adequate explanation of its policy against follow-on plans. Respondents do not discuss, however, the substance of the three opinion letters previously issued by the agency, the affidavits of PBGC's Executive Director and Chief of Actuarial Policy that were included in the administrative record, or the numerous other occasions prior to restoration, discussed in the petition, where LTV was advised of

respondents do not even discuss, much less attempt to defend, the court of appeals' central holding that, notwithstanding the exceptionally broad delegation of discretion in section 4047, PBGC's authority to restore a terminated plan is limited to one *example* cited in the legislative history.[3] That holding has serious implications not only for the PBGC, but also for other government agencies. As the Solicitor General states in his *amicus curiae* brief in support of the petition, "All federal agencies have a strong interest in correcting this erroneous approach to statutory construction—an approach that would significantly reduce agencies' powers under statutory grants of authority." Sol. Gen. brief 2.

Nor can the LTV respondents deny the legal significance of the case by claiming that PBGC's alleged failure to consider the "policies" of bankruptcy and labor law made its restoration decision arbitrary and capricious. This argument assumes the answer to a second significant question of law presented by PBGC and the Solicitor General—whether it was error for the court of appeals to require PBGC (or other federal agencies like the FDIC) to subordinate its express grant of broad regulatory authority under ERISA to inchoate policies purportedly underlying other laws. Indeed, respondents' argument confirms the dangerous doctrinal implications of the court of appeals' erroneous holding. The LTV respondents suggest that whenever a court can identify a "policy" of an-

PBGC's policy and its determination that LTV had violated it. As the LTV respondents themselves concede, PBGC sought repeatedly to prevent the establishment of the follow-on plans before taking administrative action. These facts are undisputed. Thus, this is not a case that will turn on lack of notice of the agency's policy, or of the standards by which it is applied.

[3] They likewise make no attempt to defend the court of appeals' remarkable conclusion that Congress's *inaction* on a 1987 House Ways and Means Committee proposal reflects congressional consensus not to include follow-on abuse as a basis for a restoration decision.

other law with which a party's conduct is "consistent," LTV Opp. 18, it can use it to overturn agency action, giving no deference to the agency's interpretation of its enabling statute. LTV Opp. 17 n.10. This holding too is of great concern to other agencies. *See* Sol. Gen. brief 2.

Finally, in attempting to portray the financial issue as a factual matter, LTV Opp. 21-23, the respondents assume the answer to the question of law presented by the petition—whether it was error for the court of appeals to substitute its judgment for the PBGC's as to the appropriate considerations for restoration on the basis of improved financial circumstances. The facts underlying PBGC's financial improvement standard—that the risks leading the agency to terminate the Plans had ceased to exist—are undisputed.

4. There is neither logic nor reason to LTV's assertion that the "abuse" question is "superfluous." LTV Opp. 21 n.14. Indeed, both the LTV respondents and the Equity Committee concede that the decision of the court of appeals prohibits the PBGC from considering follow-on plan abuse as a basis for restoration on remand.[4] And follow-on plan abuse is, as a matter of law, sufficient in itself to support a restoration decision (*see* Pet. App. 159a-179a), at least where, as here, there is no significant chance of immediate retermination. *See* Sol. Gen. brief 18 n.15. Moreover, the PBGC could well conclude on remand that LTV's financial improvement does not satisfy the unworkable financial standard dictated by the court of appeals, even though it satisfied the standard

[4] The LTV respondents state, for example, that "the Court of Appeals found that the PBGC's 'abuse' rationale for its LTV restoration decision had no statutory basis in ERISA, bankruptcy law or labor law." LTV Opp. 16. *See also* LTV Opp. 18 (court of appeals correctly found that PBGC's abuse rationale "had no statutory basis"). The Equity Committee similarly admits that the court of appeals concluded that section 4047 "does not permit PBGC to base a restoration decision on the establishment of follow-on Plan abuse." Equity Opp. 14-15.

used by the PBGC. In that case, the PBGC could not restore the plans or obtain further review. *See* Sol. Gen. brief 19.[5] Consequently, the holding of the court below—that *only* financial improvement can be considered under section 4047—is plainly ripe for review now.

Respectfully submitted,

Of Counsel:
THOMAS S. MARTIN
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036

RICHARD K. WILLARD
CHARLES G. COLE
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036

CAROL CONNOR FLOWE *
General Counsel

JEANNE K. BECK
Deputy General Counsel

JAMES J. ARMBRUSTER
PAULA J. CONNELLY
Attorneys

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006
(202) 778-8820

October 1989

* *Counsel of Record*

[5] The PBGC could also determine on remand that LTV's financial improvement does warrant restoration, even under the court of appeals' unworkable standard. If that determination were upheld or not challenged, the court of appeals' erroneous follow-on holdings would be left uncorrected, leaving the agency powerless to protect the insurance program from abuse, at least in that circuit.